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November 13, 2014

Toliver v. Cavalli et al; 1:10-cv-0822 (RJS)(JCF); 1:10-cv-05355 (RJS)(JCF)

Dear Judge Sullivan:

On behalf of Plaintiff Michel Toliver, we write in response to Defendants' November 12, 2014 letter. We believe that dismissal of 10-cv-0822 and 10-cv-5355 is wholly unwarranted under the circumstances.

*First*, as Defendants recognize, dismissal with prejudice is a "harsh remedy" to be used only in "extreme situations". *Koehl v. Greene*, 424 F. App'x 61, 62 (2d Cir. 2011). Such "extreme situations" are not present here. The documents referenced by Mr. Toliver on the stand, were immediately produced to Defense counsel and Defense counsel will have the opportunity to cross-examine Mr. Toliver on each of these documents during the remainder of their examination.

*Second*, there were only four documents in the set produced to Defense counsel yesterday evening that were responsive to the Bronx District Attorney line of questioning. Mr. Toliver testified on the record that he produced the December 3, 2011 document to Defendants. (11/12/2014 Trial Tr. at 278:13-279:3.) With respect to the (i) March 26, 2012; (ii) January 2, 2014 and (iii) September 23, 2014 documents, each of those is dated after the close of discovery in 10-cv-5355 and none is responsive to Defendants' document requests.<sup>1</sup> Contrary to Defendants' statement, Plaintiff does dispute that these documents should have been produced.

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<sup>1</sup> In their November 12, 2014 letter, Defendants identify two document requests to which they believe these documents were responsive. (See Letter from J. Marutollo to H. Sullivan, dated November 12, 2014 at 3 n.3.) The first, document request "8" asked that

*Third*, to the extent Defendants are now claiming that they did not have the opportunity to investigate Mr. Toliver's position that he filed a complaint with the Bronx District Attorney related to the May 20, 2010 incident, defense counsel stated on the record yesterday that they had initially planned to call representatives from the Bronx District Attorney's Office in order to testify that Mr. Toliver had not filed a complaint in connection with the May 20, 2010 incident. (11/12/2014 Trial Tr. at 284:13-24.) Plaintiff has no objection if Defendant seeks to introduce these witnesses now.

Ultimately, there are numerous ways for this trial to proceed fairly without resorting to the drastic remedy of dismissal. Dismissal under these circumstances would be unjustified and we respectfully request that Your Honor deny Defendants' request for such relief.

Respectfully,

A handwritten signature in blue ink, appearing to read "Helam Gebremariam / ke".

Helam Gebremariam

Honorable Richard J. Sullivan  
United States District Court  
Southern District of New York  
Thurgood Marshall United States Courthouse  
40 Foley Square, Room 2104  
New York, NY 10007

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Plaintiff produce "all documents that relate to all complaints *made* by plaintiff to any government agency . . ." (*Id.*) (emphasis added). The three documents at issue were not documents *made* as the date of the document requests (or as of the date of the close of discovery) and therefore, need not have been produced. Similarly with respect to "2", the request asks that Plaintiff "produce all documents regarding the Incident . . . that *are* in plaintiff's possession, custody or control". Again, these documents were not in plaintiff's possession, custody or control at the time of the document requests because they did not yet exist.

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